49. But it can be used to prove any distinct subsequent oral agreement to rescind a written contract. *Bannon v. Aultman,* 80 Wis. 307.

JUDGMENT—JUDGMENT AS BAR—IDENTITY OF QUESTION IN ISSUE.—MESSINGER V. ANDERSON, 171 FED. 785 (OHIO).—*Held,* that where the parties in two actions were the same and the question at issue is identical, as the construction of the provision of a will, the judgment in the first action is a bar to the second, if properly pleaded, although different property is the subject matter of litigation in the two actions.

To sustain a plea of former judgment in bar of a second action, it must appear that the cause of action in both suits is the same, or that some fact essential to the maintenance of the second action was at issue in the first action and was then determined adversely to the plaintiff. *Perry v. Dickerson,* 85 N. Y. 345. However, the courts do not appear to be in accord with the case at hand, for to render a judgment a bar, the subject matter of the second action must be shown to be the same as in the first. *Haight v. City of Keokuk,* 4 Iowa 199; *King v. Chase,* 15 N. H. 9. But the preponderance of authority however seems to be that the judgment of a court of competent jurisdiction, on a question directly involved in the suit is conclusive in the second suit, between the parties, although the subject matter of the second action is different than that of the first. *Doty v. Brown,* 4 N. Y. 71; *Gardner v. Buckbee,* 3 Cowen 120.

MASTER AND SERVANT—"FELLOW SERVANT"—"VICE PRINCIPAL"—WHO ARE.—MCINTYRE V. TEBBETTS, 120 S. W. 621 (MO.).—A manufacturer maintained a wagon for hauling. The servant in charge of the wagon had authority to employ men needed to assist him in the work, and he commanded them in the work. He and the men under him loaded the wagon. The servant drove the team. After a stop, one of the men, while attempting to climb on the front end where he was expected to ride, was injured in consequence of the servant starting the team. *Held,* as a matter of law, that the servant was in driving the team a fellow servant of the men. Nortoni, J., *dissenting.*

The above decision is supported by *Northern P. R. Co. v. Charles,* 162 U. S. 359, and *Page v. Battle Creek P. F. Co.,* 142 Mich. 17. In the latter case an employe in charge of a department with power to hire and discharge men, by his negligence caused injury to another servant. Yet such employee is held to be a vice principal in *Russ v. Wab. West R. Co.,* 112 Mo. 45, under facts not essentially different; and a representative of his master in *A. G. S. R. R. Co. v. Vail,* 142 Ala. 134. The nature of the act causing the injury, however, seems to be the true test. *Shelton v. Pac. Lbr. Co.,* 140 Cal. 507. In some of his acts he may perform the master's duty to the master's servants, while in others he may act as a fellow servant. *McElligott v. Randolph,* 61 Conn. 157. If the act is a personal duty of the master, the employee is a vice principal. *Scott v. C. G. W. R. Co.,* 113 Ia. 381; *Dube v. Lewiston,* 83 Me. 211. So when the duty is one which the law requires of the master. *Capper v. Louisville, Evansville & St. Louis R. Co.,* 103 Ind. 305. But if the act is one pertaining only to the